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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL H. GULLEY, JEFFREY T. SCHLESINGER, GSD, LTD., AND SOUTHWEST REALTY CONSULTANTS, INC.,
Petitioners,

v.

SUNBELT SAVINGS, FSB, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR SUNBELT SAVINGS ASSOCIATION, AND FEDERAL HOME LOAN BANK BOARD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICHARD JACKSON
Richard Jackson & Associates
18th Floor, Turtle Creek Centre
3811 Turtle Creek Boulevard
Dallas, Texas 75219
(214) 651-4255

Counsel of Record
for Petitioners

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QUESTIONS PRESENTED FOR REVIEW

1. Are claimants of failed savings and loan associations denied their Constitutional right to due process when their claims are dismissed based solely on the FHLBB's unilateral determination that there are insufficient assets to satisfy their claims?

2. Does the Fifth Circuit's holding that claimants of a failed institution do not have the right to have their claims adjudicated conflict with this Court's holding in *Coit* that claimants do have such a right?

3. May the claims of a claimant of a failed savings association be dismissed solely because the FHLBB said that there are no assets to pay the claimant, or must the government prove that the claimant could never recover from any source?

4. Do state savings and loan liquidation priority schemes apply to deny a claimant's claim when a savings association was not liquidated and no claimants were paid?

5. May the Fifth Circuit render the Texas Fraudulent Transfer Act a complete nullity?

6. Is the Constitutional separation of powers doctrine and the checks and balances system violated if FHLBB decisions are not subject to review?

LIST OF PARTIES

Petitioners: Michael H. Gulley, Jeffrey T. Schlesinger, GSD, Ltd., and Southwest Realty Consultants, Inc.

Respondents: Sunbelt Savings, FSB, Federal Savings and Loan Insurance Corporation, as Receiver for Sunbelt Savings Association, and Federal Home Loan Bank Board

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 902 F.2d 348, and is reprinted in the appendix hereto.

The memorandum opinion and order of the United States District Court for the Northern District of Texas is reported at 714 F.Supp. 817, and is reprinted in the appendix hereto.

The order of the United States Court of Appeals denying Petitioners' Motion for Rehearing is reprinted in the appendix hereto.

JURISDICTION

Petitioners seek review of the Judgment of the Court of Appeals for the Fifth Circuit entered on June 1, 1990. Petitioner's Motion for Rehearing was denied on June 27, 1990.

The Court has jurisdiction to review the Judgment of the Court of Appeals for the Fifth Circuit by writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article III
Section 1 ..... (Appendix 14a)
United States Constitution, Amendment V ... (Appendix 14a)
Tex. Bus. & Com. Code § 24.005. ..... (Appendix 14a)
Tex. Bus. & Com. Code § 24.006 ..... (Appendix 15a)
Tex. Bus. & Com. Code § 24.008 ..... (Appendix 16a)
Tex. Rev. Civ. Stat. Ann. art. 852a, § 8.09(g) (Appendix 16a)

STATEMENT OF THE CASE

An underlying and ancillary suit is presently pending in the United States District Court for the Northern District of Texas, Dallas, Division in which Michael H. Gulley, Jeffrey T. Schlesinger, GSD, Ltd., and Southwest Realty Consultants, Inc., (collectively "Gulley") assert numerous claims and causes of action against Sunbelt Savings Association of Texas ("Sunbelt"). In that suit, Gulley makes claims for money damages against Sunbelt in substantial sums as a result of the wrongful conduct of Sunbelt.

In August, 1988 (during the pendency of that underlying suit), the Federal Home Loan Bank Board ("FHLBB") declared Sunbelt insolvent and appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver. At that time FSLIC transferred most of Sunbelt's assets and some of Sunbelt's liabilities to a newly-created Sunbelt Savings, FSB ("FSB"). FSLIC transferred the remaining assets to itself in its corporate capacity and retained the bulk of Sunbelt's liabilities in FSLIC, Receiver, without sufficient assets with which to satisfy those liabilities. As a part of this maneuvering, FHLBB found Gulley's (and all claimants') claims to be "worthless" because they had just transferred away all assets with which their monetary claims could have been satisfied. No claimants of Sunbelt were paid, no claims procedure was set up to sift through the various claimants of Sunbelt, and the entire transfer and "determination" of worthlessness was done simultaneously.

The transfer of Sunbelt's assets and the separation of those assets from the corresponding liabilities is what resulted in Sunbelt's inability to respond in money damages to any judgment that may be rendered against it.

As a result, Gulley brought this separate suit in Texas state court against FSB, the recipient of most of Sunbelt's assets, seeking a declaratory judgment that the transfer of Sunbelt's assets to FSB violated the Texas Fraudulent Transfer Act and that therefore the transfer was void. Pursuant to that statute, the voiding of the transfer would result in Sunbelt's assets being available to satisfy claimants such as Gulley.

The FHLBB and FSLIC intervened in this suit as Defendants, and the FSLIC immediately removed the suit to federal court. FSB, FSLIC and FHLBB then filed Motions for Summary Judgment, asserting that the Texas Fraudulent Transfer Act was preempted by federal law. The trial court agreed and rendered judgment against Gulley.

Gulley appealed the district court's decision, alleging that federal law does not preempt the Texas statute, and that prohibiting him from litigating his state law claims would violate the United States Constitution. The Fifth Circuit affirmed the lower court's decision, not on the preemption issue, but instead held that the FHLBB's finding of "worthlessness" of Gulley's (and all other claimants') claims at the

moment of the takeover was binding on Gulley, and since the assets of Sunbelt were not available to satisfy his claims, Gulley cannot bring a claim under the Fraudulent Transfer Act.

Gulley filed a Petition for Rehearing, asking the court to consider his Constitutional arguments. The court denied the request for a rehearing.

BASIS OF ORIGINAL FEDERAL JURISDICTION

The basis of original federal jurisdiction is 12 U.S.C. § 1730(k)(1). Upon intervening in the state court action, FSLIC removed the suit to federal court allegedly under 12 U.S.C. § 1730(k)(1).

REASONS FOR GRANTING THE WRIT

1) The denial of Constitutional rights of all claimants of all failed savings and loan associations has a far-reaching impact.

2) The Fifth Circuit's opinion that claimants of a failed institution do not have the right to have their claims adjudicated conflicts with this Court's decision in *Coit*, in which this Court held that such claimants do have the right to have their claims heard in court.

3) The Fifth Circuit's decision that the FHLBB's factual finding of "worthlessness" is binding on Gulley and conclusively determinative of his claims, conflicts with its prior decision of *Triland Holdings*, in which it held that a suit cannot be dismissed upon a claim of uncollectability based on "prudential mootness" unless the FSLIC proves there is absolutely no possibility the claimant can ever recover anything.

4) The Fifth Circuit misapplied the Texas Savings and Loan priority system because in this instance Sunbelt was not liquidated and none of Sunbelt's claimants were paid; therefore, the priority system (which expressly applies only in cases of liquidation) should not be grounds for dismissing Gulley's claims.

5) The Fifth Circuit has effectively rendered the Texas Fraudulent Transfer Act a complete nullity.

I. The Fifth Circuit's Holding That the FHLBB's Finding Of Worthlessness Is Determinative Of Gulley's Claims Denies Gulley, As Well As All Other Claimants Of All Failed Institutions, Their Constitutional Rights.

The Fifth Circuit held that the FHLBB's finding that general creditors' claims against Sunbelt are worthless is binding on Gulley. Because of the binding effect of that finding, the court further held, Gulley does not have a right to have his claims paid and therefore he no longer has a claim. 902 F.2d at 351. The Fifth Circuit effectively held that because of the FHLBB's finding of worthlessness, Gulley cannot even adjudicate his claims.

If, as the Fifth Circuit held, the FHLBB's decision is a final determination of Gulley's claims, not subject to judicial review, then Gulley has been deprived of his property without just compensation, the separation of powers doctrine and the constitutional checks and balances system have been ignored, and Gulley has been deprived of his due process right to be heard by an impartial tribunal.

Gulley brought this suit based upon a statutory claim of fraudulent transfer. The Fifth Circuit held that Gulley cannot bring such a claim because of an administrative decision, i.e., an untested and factually unsupported finding by the FHLBB that all unsecured claimants' claims were "worthless". The Fifth Circuit stated that this administrative activity, to which Gulley was not a party and in which Gulley was not permitted to participate, is binding on Gulley without a trial or any other vestige of due process. This decision affects all claimants of failed institutions, as well as Gulley.

A. *Due Process*

The FHLBB's determination that there are no assets with which to pay Gulley's claims is a final determination of Gulley's claims. Gulley is not entitled to an adjudication of his claims because the FHLBB finding is binding on him. Gulley did not receive notice that the FHLBB would be making a binding determination of his claims, and the Fifth Circuit here has held that he is entitled to no hearing on his claims.

This deprives Gulley of his right to due process that is guaranteed by the Constitution. The Fifth Circuit decision

also has the precedential effect of permitting the denial of due process of all claimants of all failed savings and loan associations.

Due process at the very minimum requires "that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950). This Court has further held:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Armstrong v. Manzo, 380 U.S. 545, 550 (1965) (citing *Milliken v. Meyer*, 311 U.S. 457 (1940)).

This Court "consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). There is even more need for due process protections when an administrative agency is given discretion to act. *Ohio Bell Tele. Co. v. Public Utils. Comm'n*, 301 U.S. 292, 304 (1937). "A fair and open hearing" is essential to administrative proceedings. *Morgan v. United States*, 304 U.S. 1, 15 (1938).

"Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah v. Larche*, 363 U.S. 420, 442 (1960). If, as the Fifth Circuit held, the FHLBB's finding of "worthlessness" is a final, binding ruling on Gulley's claims, due process was required with respect to the FHLBB's proceedings. A cause of action is a property interest protected by due process. *Mullane*, 339 U.S. at 313.

Due process protections cannot be compromised on the basis of "convenience or expediency." *Ohio Bell*, 301 U.S. at 305. The governmental interest in expediency in the savings and loan bailout cannot excuse the deprivation of Gulley's constitutional rights.

Nor is the fact that the Fifth Circuit disputes that Gulley is entitled to the property sufficient grounds to deprive him of due process. "The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing." *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972). All that is required to invoke due process protection is "that a significant property interest is at stake, whatever the ultimate outcome of a hearing" concerning the right to the property. *Id.* at 87.

The FHLBB's decision has deprived Gulley of his claims and his rights to the assets of Sunbelt. The decision to deprive Gulley of his cause of action was made without notice to him and without giving him an opportunity to be heard. This is contrary to the Constitution and should be reversed.

The FHLBB has recognized the need to comply with due process requirements in determining claims. It has set up a claims procedure for FSLIC in conducting a receivership of a failed institution.

Even when Congress hurriedly put together FIRREA in an emergency measure to save the thrift industry, it provided for a mandatory claims procedure complete with administrative review for claimants of a failed institution. FIRREA attempts to provide due process protections by requiring notice and an opportunity to be heard.

Here, however, Gulley received no notice, no claims procedure, no hearing, and now no judicial determination of his claims. Gulley has been totally deprived of his causes of action and his right to follow the assets of Sunbelt without any due process protections.

Denying Gulley his due process rights will have far-reaching effects. The Fifth Circuit is in essence holding that the FHLBB's finding of worthlessness is binding on all claimants of Sunbelt and all claimants of all other failed institutions, and that this unilateral, secret process by the FHLBB is sufficient to preclude them from asserting their claims in court. None of the claimants were afforded due process protections in connection with this binding FHLBB decision. The Fifth Circuit opinion holding the administrative decision binding on such claimants has resulted in the denial of all claimants' due process rights. This Court should grant certiorari to consider this issue.

B. *Separation of Powers and Checks and Balances*

The trial court held that this juggling of assets and liabilities by FSLIC and FHLBB is not subject to judicial review (as wrongful or fraudulent transfer, or otherwise) because they have been given discretion by Congress to make any transfers they desire. The Fifth Circuit affirmed that holding.

Such a position usurps the powers of the judicial branch, and violates the doctrines of separation of powers and checks and balances, which are required by article III, section I of the Constitution of the United States.

The federal Constitution and most state constitutions are based on the principle of separation of powers . . . lawmaking power to the legislature, law-enforcing power to the executive, and law-deciding power to the judiciary. The underlying objective of the system is to provide a check and balance on each branch by the other two. Checks and balances are to assure that governmental power is properly confined, and that public officials can be held to account for their decisions.

"Article III, § 1 safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986).

The framers of our Constitution foreswore convenience and efficiency in adjudication in order to preserve freedom. *See INS v. Chadha*, 462 U.S. 919 (1983). "The fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of the government, standing alone, will not save it if it is contrary to the Constitution." *Id.* at 944.

The Fifth Circuit held that the FHLBB's finding of worthlessness is determinative of Gulley's claims. The adjudicatory decision is binding on Gulley and precludes his claims. Gulley has no right to judicial determination of his claims. The FHLBB thinks it has been given the power to write the rules, execute the rules and interpret the rules, even though the FHLBB is a party to the fraudulent transfer complained of in this suit. According to the Fifth Circuit, the FHLBB may do all this without being subject to judicial review.

The framers of our Constitution recognized that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 300 (H. Lodge ed. 1888) (J. Madison).

Permitting the FHLBB's decision to be a final adjudication of Gulley's claims violates the separation of powers doctrine. Holding that Gulley has no right to judicial redress effectively exempts the FHLBB from the checks and balances system of the Constitution. This cannot be permitted.

II. The Fifth Circuit's Holding That Claimants Of A Failed Institution Do Not Have The Right To Have Their Claims Adjudicated Conflicts With This Court's Holding In *Coit* That Claimants Do Have Such A Right

A. *The Coit Decision*

The Fifth Circuit held that because of the FHLBB's finding of worthlessness, Gulley does not have the right to be paid and therefore may not assert his claims. That holding is directly contrary to this Court's decision in *Coit Independence Joint Venture v. FSLIC*, 109 S.Ct. 1361 (1989).

In *Coit*, this Court held that "Congress clearly envisaged that the courts would have subject matter jurisdiction over creditor suits against FSLIC." *Id.* at 1371. This Court held that Congress did not give FSLIC the power to adjudicate the claims of claimants of a failed savings association, but that courts must do so. *Id.* The Court noted that had Congress intended to give FSLIC adjudicatory power, it would have expressly done so. *Id.* at 1369.

Likewise, Congress did not give the FHLBB the authority to adjudicate the claims against a failed institution. As this Court noted, FSLIC and the FHLBB are "empowered to adjudicate violations of federal law, to issue cease-and-desist orders, to remove officers and directors, and to impose civil sanctions." *Id.* at 1369. These statutory provisions explicitly set forth the adjudicatory process to be followed and the type of judicial review available. *Id.*

"It is thus reasonable to infer that if Congress intended to infer adjudicatory authority upon FSLIC in its receivership

capacity [and the FHLBB], it would have enacted similar provisions governing procedural and substantive rights and providing for judicial review." *Id.*

Congress gave the FHLBB authority to adjudicate certain types of claims and specifically set forth the procedural protections to be followed in such adjudication. Congress did not grant the FHLBB the authority to adjudicate the claims of claimants of the failed association and did not set up procedural safeguards. The FHLBB, then, does not have the authority to adjudicate Gulley's claims, and the Fifth Circuit erred in holding that it did.

Further, in *Coit* the Court found that the administrative procedures set up by the FHLBB for claimants of a failed institution were inadequate for two reasons. First, the procedures were inadequate because they gave the FSLIC and the FHLBB the authority to adjudicate the claims without being subject to *de novo* judicial review. 109 S.Ct. at 1375. Second, the procedures were inadequate because they permitted a claim to be "relegated to a 'black hole' from which it may not emerge." *Id.*

Here, Gulley's claims have been sucked into the black hole. The FHLBB has been given adjudicatory power over Gulley's claims, and Gulley has been denied his right to judicial review. If the procedures used in *Coit* were inadequate, the complete lack of a claims process, accompanied by the attendant death of Gulley's claims is unacceptably inadequate. The Fifth Circuit's opinion is contrary to the teachings of *Coit*.

B. *Adjudication*

The Fifth Circuit held that the FHLBB's decision is a final determination of Gulley's claims and that Gulley is entitled to no further fact-finding. This constitutes adjudication.

Adjudication by an agency "is concerned with the determination of past and present rights and liabilities . . . . In such proceedings, the issues of fact are often sharply controverted." *Marathon Oil v. Environmental Protection Agency*, 564 F.2d 1253, 1262 (9th Cir. 1977), (quoting Attorney General's Manual on the Administrative Procedure Act at 14-15 (1947)).

Adjudication is distinguished from agency rule making, which is legislative in nature and applies prospectively only, and is mere policy-making. *Marathon Oil*, 564 F.2d at 1261-62 and n.27. When the agency "proceedings determine the specific rights of particular individuals or entities," it is adjudication and not rule-making. *Id.* at 1261.

The Fifth Circuit effectively held that the FHLBB has adjudicatory power, because it held that the FHLBB's finding that general creditors' claims against Sunbelt are worthless is determinative of Gulley's claims. Further, the FSLIC and the FHLBB have consistently argued the FHLBB finding of worthlessness is a final agency action appealable under the Administrative Procedures Act ("APA").

Congress has not given the FHLBB the authority to adjudicate claims such as Gulley's. Moreover, if the FHLBB decision is determinative of Gulley's claims, the FHLBB failed to comply with the procedural requirements of the APA. 5 U.S.C. § 551 *et seq.* As a result, the decision is subject to attack.

By holding that the FHLBB decision is determinative of Gulley's claims, the Fifth Circuit has given the FHLBB the power of adjudication. The FHLBB did not comply with Constitutional and APA procedural safeguards in rendering its decision, and Congress did not give the FHLBB such power. The decision is also contrary to this Court's holding in *Coit* that such claims must be adjudicated by the courts. Certiorari should be granted so that these issues may be resolved.

III. The Fifth Circuit Opinion Conflicts With Its Prior Decision In *Triland Holdings*, Which Requires Proof That Gulley Will Never Recover Any Assets

The Fifth Circuit held that as a result of the FHLBB's finding that general creditor's claims are worthless, Gulley is foreclosed from recovering. This decision is directly contrary to the Fifth Circuit's decision in *Triland Holdings & Co. v. Sunbelt Serv. Corp.*, 884 F.2d 205 (5th Cir. 1989).

In *Triland*, FSLIC argued that Triland's claims should be dismissed as moot because Sunbelt had no assets with which to satisfy a judgment. The Fifth Circuit rejected FSLIC's argument, holding that FSLIC must prove on the record "there will never be any possibility of satisfying a

favorable judgment" and that "all potential forms of relief are permanently precluded." *Id.* at 208.

In the present case, the Fifth Circuit contradicted itself by saying FSLIC does not have to prove Gulley could never receive anything, but that the FHLBB's finding of worthlessness is sufficient proof. Thus is in direct conflict with *Triland.*

The same FHLBB worthlessness finding as to Sunbelt's creditors was on the record as evidence in *Triland*, and that court said the finding was not sufficient proof to justify dismissal. *Id.* The court said "But *on the record before this court*, we are unable to determine that there will never be any possibility of satisfying a favorable judgment." *Id.* (emphasis added). The record before the *Triland* court contained the same "worthlessness" finding as in this case, and it was insufficient grounds for dismissal.

Certiorari should be granted so that the conflict between these two cases can be resolved.

IV. The Fifth Circuit Misapplied The Priority System; Therefore, The Priority System Should Not Be Used To Preclude Gulley's Claims

The Fifth Circuit stated that FHLBB regulations permitted the application of state priority schemes, and the Texas scheme provides that in liquidations, depositors are given preference over general creditors. The court reasoned that if there were insufficient assets to satisfy the depositors, no assets are left for the general creditors under the priority scheme, and as a result Gulley is not entitled to assert his claims. 902 F.2d at 350-51.

The Fifth Circuit improperly applied the Texas priority scheme in determining whether Gulley can recover any assets, because that scheme is not applicable in purchase and assumption agreements, but only in liquidations.

Tex. Rev. Civ. Stat. Ann. art. 852, § 8.09(g) provides "On *liquidation* of an association, claims for payment shall have the following priority . . . ." (emphasis added). The Texas priority scheme only applies when the savings institution is liquidated and its creditors paid off. Priorities can only be used if some creditors are paid. If no creditors are paid, there can be no priority of payment.

When FSLIC was appointed receiver, it did not liquidate Sunbelt. FSLIC did not pay *any* claims, and did not establish a claims procedure. The Texas priority scheme does not apply.

The Fifth Circuit argued that the purchase and assumption transaction with respect to Sunbelt's assets is the same as liquidation, and therefore the priority statute applies. 902 F.2d at 350 n.2. "When the result of a purchase and assumption transaction is to allocate assets to satisfy the demands of competing claimants, with certain categories of claimants receiving priority, FSLIC acts as a liquidator." However, with Sunbelt, FSLIC did not "allocate assets" to satisfy "competing claimants." FSLIC paid no claimants of Sunbelt; therefore, FSLIC did not act as a liquidator, and the priority statute did not apply.

The FSLIC, FHLBB and FDIC are using this "priority" argument to deny numerous claims. Granting certiorari would resolve the question of whether the application of state priority schemes to preclude claims is appropriate in a purchase and assumption transaction.

V. The Fifth Circuit Renders Texas Fraudulent Transfer Act a Nullity

Gulley brought suit to void the fraudulent transfer of assets from Sunbelt to FSB, so that the assets could be used to satisfy his claims. The Texas Fraudulent Transfer Act provides that a transfer is fraudulent if the transferor did not receive an equivalent value in exchange for the transfer and the transferor is insolvent or becomes insolvent as a result of the transfer. Tex. Bus. & Com. C. §§ 24.005, 24.006 (Vernon 1987). The remedy for a fraudulent transfer is to void the transfer so that the creditor's claim can be satisfied. Tex. Bus. & Com. C. § 24.008 (Vernon 1987).

The Fifth Circuit held that the statute was inapplicable because Gulley was not a "creditor" as defined by that statute. The Fifth Circuit's reasoning behind this holding is circuitous and illogical.

The Fifth Circuit said that "creditor" is defined as "a person who has a claim." 902 F.2d at 350 (citing Tex. Bus. & Com. C. § 24.002(4)). The court reasoned that because the FHLBB found Gulley's claim is worthless, Gulley cannot reach the assets of Sunbelt and therefore does not have a claim. Gulley, then, is not a "creditor". 902 F.2d at 351.

The Fifth Circuit is saying that if the transferor of the assets makes a declaration that a creditor cannot reach the assets, and then places those assets beyond the reach of the creditor, the creditor no longer has a claim. But this is exactly the type of fraudulent action the statute was enacted to prohibit. To hold that such a creditor no longer has a claim completely nullifies the meaning of the Texas Fraudulent Transfer Act.

The court is saying that if assets are not available to a claimant, the claimant cannot bring a claim under the fraudulent transfer statute. But the statute provides that if assets are transferred so that they are not available to a claimant, the claimant has a cause of action under the statute. The Fifth Circuit is holding that if a fraudulent transfer has occurred, i.e., the assets have been placed out of the reach of the creditor, the creditor no longer has a claim under the statute and no standing to invoke the statute's protection.

The Fifth Circuit should not be permitted to completely nullify a state statute. Certiorari should be granted to resolve this matter.

CONCLUSION

In its zeal to clean up the savings and loan mess, the government has trampled on the Constitutional rights of the public. The courts have ignored statutory and case law precedent in an effort to give the government free reign in dealing with the savings and loan crisis. Writ of certiorari should be granted to consider whether the government has exceeded the bounds of the Constitution.

Respectfully submitted,

RICHARD JACKSON
Richard Jackson & Associates
18th Floor, Turtle Creek Centre
3811 Turtle Creek Blvd.
Dallas, Texas 75219
(214) 651-4255

Counsel of Record
for Petitioners

APPENDIX

BEST AVAILABLE COPY

Michael GULLEY, et al.,
Plaintiffs-Appellants,

v.

SUNBELT SAVINGS, F.S.B., et al.,
Defendants-Appellees.

VALLEY RANCH DEVELOPMENT CO., LTD., et al.,
Plaintiffs-Appellants,

v.

SUNBELT SAVINGS, FSB, et al.,
Defendants-Appellees.

Nos. 89-1623, 89-1624.

United States Court of Appeals,
Fifth Circuit.

June 1, 1990.

Richard Jackson, Tresi Moore Freemyer, Richard Jackson & Assoc., Dallas, Tex., for plaintiffs-appellants.

Thomas E. Kurth, Haynes and Boone, Dallas, Tex., for Sunbelt Savings, FSB.

Kirk K. Van Tine, James M. Silver, Washington D.C., for FSLIC.

James A. Herldriksen, Sr. Trial Atty., Thomas J. Segal, Assoc., Chief Counsel, Washington, D.C., for Office of Thrift Supervision.

Appeals from the United States District Court for the Northern District of Texas.

Before GOLDBERG, REAVLEY and HIGGINBOTHAM, Circuit Judges.

REAVLEY, Circuit Judge:

Valley Ranch Development Company and Michael Gulley each brought a state law action seeking a declaration that, pursuant to the Texas Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code Ann. §§ 24.001-.013 (Vernon 1987), the transfer of assets by the Federal Savings and Loan Insurance Corporation (FSLIC) to Sunbelt Savings, FSB was void. The cases were removed to federal court where judgments were entered against both plaintiffs upon the court's determination that the Fraudulent Transfer Act is preempted by laws granting FSLIC authority to dispose of a failed institution's assets. We affirm the district court's judgments without reaching the preemption issue.

I.

On August 19, 1988, the Federal Home Loan Bank Board (FHLBB) issued a resolution declaring Sunbelt Savings Association of Texas ("Sunbelt Savings") insolvent and appointing FSLIC to act as receiver of the failed institution. The resolution directed FSLIC to liquidate Sunbelt Savings' assets. To accomplish the liquidation, FSLIC entered into an Acquisition Agreement with Sunbelt Savings, FSB ("New Sunbelt"), a newly chartered federal savings bank. Pursuant to that agreement, FSLIC transferred virtually all of Sunbelt Savings' assets to New Sunbelt. In return, New Sunbelt assumed liabilities to depositors, to the extent of their deposits, and liabilities to secured creditors, to the extent of the value of their security. New Sunbelt did not assume liabilities to unsecured general creditors.

At the time of the insolvency declaration, Valley Ranch Development Company and Michael Gulley, hereinafter appellants, were plaintiffs in actions against Sunbelt Savings that were pending in state court. FSLIC, in its capacity as receiver, subsequently removed these proceedings to federal district court, where they currently are pending. The Acquisition Agreement, however, left no assets in the receivership estate to satisfy a judgment should appellants prevail in their suits. Accordingly, appellants brought separate state court actions against New Sunbelt seeking a declaration that the transfer of assets pursuant to the Acquisition Agreement was void. FHLBB and FSLIC intervened in the suits as defendants, and FSLIC removed the proceedings to federal court.

On motions for summary judgment, the district court concluded that application of the Fraudulent Transfer Act would stand as an obstacle to the accomplishment and execution of the full purposes of Congress in granting FSLIC authority to dispose of the assets of failed savings and loans. The court thus held that the Act is preempted and entered judgment for the defendants. *See Gulley v. Sunbelt Savings FSB*, 714 F. Supp. 819 (N.D. Tex. 1989); *Valley Ranch Dev. Co. v. Sunbelt Savings FSB*, 714 F. Supp. 817 (N.D. Tex. 1989).

II.

[1] The relief appellants sought in the district court was a declaration that FSLIC's transfer of assets to New Sunbelt was void because it was in violation of the Fraudulent Transfer Act. This court has held that the purpose of that statute is to provide creditors a means of obtaining relief when a debtor transfers an asset "in an effort to put it out of the reach of creditors," *In re MortgageAmerica Corp.*, 714 F.2d 1266, 1275 (5th Cir. 1983), thereby leaving the debtor without sufficient assets to satisfy creditors' claims. *Cf. Harrisburg Nat. Bank v. Geo. C. Vaughan & Sons*, 204 S.W.2d 9, 12 (Tex. Civ. App.–Galveston 1947, writ dism'd) ("The manifest purpose of the statute is to prevent debtors from taking their property from view and placing it beyond the reach of their creditors."). In such a case, a creditor may obtain an "avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim." Tex. Bus. & Com. Code Ann. § 24.008(a) (Vernon 1987).

The statute defines a "creditor" as "a person . . . who has a claim." *Id.* § 24.002(4). A "claim" is defined as "a right to payment or property, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Id.* § 24.002(3). In order to obtain relief under the statute, therefore, appellants had to show, at a minimum: (1) that they had a right to payment out of the assets in the Sunbelt Savings receivership estate; (2) that FSLIC transferred those assets out of the receivership estate; (3) that the transfer was fraudulent within the meaning of the statute, *see id.* §§ 24.005(a), 24.006; and (4) that avoidance of the transfer was necessary to satisfy their claims.

[2] As noted above, FHLBB appointed FSLIC as receiver and directed it to liquidate Sunbelt Savings' assets. The relevant federal statute granted FSLIC the rather broad authority "to liquidate [an association's] assets in an orderly manner."[1] 12 U.S.C. § 1729(b)(1)(A)(v) (repealed 1989); *see id.* § 1729(c)(1)(A) (repealed 1989). FSLIC's discretion was limited to a certain extent by a federal regulation that establishes a priority system for the payment of unsecured claims against an institution being liquidated.[2] *See* 12 C.F.R. § 569c.11(a). That regulation accords top priority as between unsecured creditors to creditors with claims for administrative expenses, wages and salaries, and government taxes. *Id.* § 569c.11(a)(1)-(5). Next in line are persons with "[c]laims for withdrawable accounts" and persons holding any "other claims which have accrued and become unconditionally fixed on or before the date of default." *Id.* § 569c.11(a)(6). This particular subsection, however, provides that, if the liquidation involves a state-chartered association and state law gives priority to depositors over other general creditors, that aspect of the state's priority law will apply. *Id.* The relevant Texas priority scheme prefers depositors to general creditors in a liquidation situation. *See* Tex. Rev. Civ. Stat. Ann. art. 852a, § 8.09(g) (Vernon Supp. 1990). Thus, federal

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[1] The Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 1989 U.S. Code Cong. & Admin. News (103 Stat.) 183, repealed substantial portions of the National Housing Act and transferred the authority that FSLIC previously exercised over savings and loans to the Federal Deposit Insurance Corporation.

[2] Appellants suggest that, in transferring Sunbelt Savings' assets to New Sunbelt, FSLIC did not liquidate those assets but instead engaged in a purchase and assumption transaction, which in turn requires application of different statutory and regulatory provisions. We disagree. When the result of a purchase and assumption transaction is to allocate assets to satisfy the demands of competing claimants, with certain categories of claimants receiving priority FSLIC acts as a liquidator. *See North Miss. Sav. & Loan Ass'n v. Hudspeth*, 756 F.2d 1096, 1102 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054, 106 S.Ct. 790, 88 L.Ed.2d 768 (1986), *overruled in part on other grounds, Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp.*, ——— U.S. ———, 109 S.Ct. 1361, 103 L.Ed.2d 602 (1989). The "bulk liquidation" employed in this case merely expedited the asset distribution process.

regulations required FSLIC to pay depositors' claims before it paid general creditors' claims.[3]

[3] In its resolution declaring Sunbelt Savings insolvent, FHLBB noted that the institution's assets were insufficient to satisfy secured and deposit liabilities. In light of this shortfall and the priority regulation favoring depositors over general creditors, FHLBB entered a finding that general creditors' claims against Sunbelt Savings were worthless.[4] This finding foreclosed any right general creditors may have had to payment of their claims out of the receivership assets. The finding also set the stage for FSLIC's liquidation of Sunbelt Savings' assets through the Acquisition Agreement, pursuant to which New Sunbelt assumed liabilities to depositors, to the extent of their deposits, and liabilities to secured creditors, to the extent of the value of their security.

Study of the consequences of these events reveals that appellants are not entitled to relief under the Fraudulent Transfer Act. To the extent they had valid claims against Sunbelt Savings prior to the insolvency declaration, appellants were either secured creditors or unsecured general creditors. If appellants were secured creditors, New Sunbelt has assumed Sunbelt Savings' liability and avoidance of the transfer is unnecessary to satisfy the claims. If appellants were unsecured general creditors, they no longer have a claim against the transferred assets. As a matter of federal law, the FHLBB worthlessness finding foreclosed any right general creditors previously may have had to payment out of Sunbelt Savings' assets. In either case resort to the Fraudulent Transfer Act was inappropriate. Because the statute was inapplicable to FSLIC's transfer to New Sunbelt, there was no conflict requiring consideration of the preemption issue.

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[3] Appellants erroneously contend that FHLBB directed FSLIC to apply all portions of the Texas priority statute in liquidating Sunbelt Savings' assets. Review of the FHLBB resolution reveals that the only aspect of the Texas scheme FSLIC was to apply was that granting depositors priority over other unsecured general creditors. In all other respects, claimants' priority was governed by the federal statute and regulations discussed above.

[4] We are bound by FHLBB's worthlessness determination in this proceeding. Appellants did not challenge this determination in the district court, nor is it clear they could do so in this collateral proceeding. *See Village South Joint Venture v. Federal Deposit Ins. Corp.*, 733 F. Supp. 50 (N.D. Tex. 1990); *Federal Sav. & Loan Ins. Corp. v. Locke*, 718 F. Supp. 573, 586 (W.D. Tex. 1989).

[4] In the appellate briefs and in oral argument before this court counsel for appellants raised a number of arguments attacking the means by which FSLIC carried out its receivership responsibilities. The primary complaint raised in oral argument was that FSLIC did not adopt a procedure to classify creditors' claims against Sunbelt Savings. Appellants also contend that FSLIC's actions resulted in various constitutional violations. Because appellants did not raise these arguments in the district court and they are irrelevant to the sole issue raised by appellants' district court petitions--whether the Fraudulent Transfer Act requires avoidance of the transfer to New Sunbelt--we decline to consider them.

The district court's judgments are AFFIRMED.

Michael GULLEY et al., Plaintiffs,

v.

SUNBELT SAVINGS FSB, et al., Defendants.

Civ. A. No. 3-88-3062-H

**UNITED STATES DISTRICT COURT,
N.D. TEXAS,**

DALLAS DIVISION

June 8, 1989.

Richard Jackson, Dallas, Tex., for plaintiffs.

Kenneth B. Tomlinson, Baker & Botts, Dallas, Tex., Kirk K. Van Tine, Robert Asher, Jordan Luke, Gen. Counsel, Dorothy Nichols, Sr. Associate Gen. Counsel, Federal Home Loan Bank Bd., Washington, D.C., for Federal Home Loan Bank Bd.

Lee R. Larkin, J. Scott Carothers, Andrews & Kurth, Houston, Tex., for FSLIC.

Nina Cortell, Haynes & Boone, Dallas, Tex., for Sunbelt.

MEMORANDUM OPINION AND ORDER

SANDERS, District Judge.

Before the Court are Defendant-Intervenors' Motions for Summary Judgment, filed January 13, 1989; Plaintiffs' Response filed March 8, 1989; Movants' Replies, filed March 20, 1989; Plaintiffs' Supplemental Response, filed March 27, 1989; and Movants' Supplemental Reply, filed April 4, 1989.

Background

This dispute is related to two other actions pending in this district, *Gulley, et al. v. Sunbelt Savings Ass'n, et al.*, Civil Action No. CA-3-88-1417-D and *Sunbelt Savings Ass'n, et al. v. GSD, Ltd., et al.*, Civil Action No. CA-3-88-2194-C.[1] In August of 1988, the Federal Home Loan Bank Board appointed the FSLIC as Receiver for Old Sunbelt and created a new savings and loan association, New Sunbelt. The Bank Board directed the FSLIC as Receiver in a purchase and assumption transaction to transfer the majority of Old Sunbelt's assets. Bank Board's Brief at 2.

On November 10, 1988, Plaintiffs filed this action against New Sunbelt in Texas State Court. In December, the Bank Board and the FSLIC intervened in this action and removed the case to this Court, pursuant to 12 U.S.C. § 1730(K)(1). Bank Board's Brief at 1. In this action, Plaintiffs allege that the transfer of Old Sunbelt's assets violated the Texas statute prohibiting fraudulent transfers. Plaintiffs' Original Petition at 3. *See* Tex. Bus. & Comm. Code Ann. §§ 24.005 and 24.006 (Vernon 1987). Defendant-Intervenors move for summary judgment, arguing that the declaratory judgment Plaintiffs seek would require that the Court void the actions of the Bank Board and the FSLIC in transferring the assets of Old Sunbelt. Movants argue that the Texas fraudulent transfer statute is not applicable to the transaction. Additionally, they contend that even if it were applicable, the Texas statute would be preempted. Bank Board's Brief at 3.

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[1] The first case, brought by these same Plaintiffs, concerns land known as the Encino Park property. In 1984, Old Sunbelt was one of the participants in a 50,000,000.00 loan to GSD, Ltd. for the development of the property. When GSD and the guarantors defaulted on the loan, Sunbelt foreclosed and the Plaintiffs filed suit to challenge the foreclosure. The second case was brought by Old Sunbelt to recover the amount due on the Encino Park note and guaranties.

Analysis

In *Coit Independence Joint Venture v. FSLIC*, 109 S.Ct. 1361 (1989), 57 U.S.L.W. 4347, the Supreme Court held that "*the enabling legislation* of FSLIC and the Bank Board" does not preempt state law. 57 U.S.L.W. at 4353 (emphasis added). Preemption may result, however, in other circumstances. Federal law may supersede state law in three ways. (1) "when acting within constitutional limits, Congress is empowered to preempt state law by so stating in express terms"; (2) "congressional intent to preempt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation"; and (3) "in those areas where Congress has not completely displaced state regulation, federal law may nonetheless preempt state law to the extent it conflicts with federal law." *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 280-81 (1987). Such conflict occurs either because (a) "compliance with both federal and state regulations is a physical impossibility"[2] or (b) the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 479 U.S. at 281 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

The third reason for preemption — conflict of laws — is not inconsistent with the Court's holding in *Coit*. Thus, the question in the instant case is whether the Texas fraudulent transfer statute stands as an obstacle to the accomplishment and objectives of Congress, whether it conflicts with federal law. The Court agrees with Movants that: a conflict exists; that Texas law is preempted in this case; and that Movant's summary judgment motion should be granted.

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[2] 479 U.S. at 281 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).

Congress created a comprehensive framework for the regulation of federally insured thrifts, granting the Bank Board broad discretionary powers to regulate the savings and loan industry. *See* 12 U.S.C. §§ 1421-1449; 12 U.S.C. §§ 1461-1470; 12 U.S.C. §§ 1701-1730; *Fidelity Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 144-45, 156, 159-62 (1982). Congress has empowered the FSLIC as Receiver to choose among several courses of action, including the merger of a failed association with another insured institution, the organization of a new federal association to take over the assets of the failed association, or such other disposition of the matter as the FSLIC deems appropriate. 12 U.S.C. § 1729(b)(1)(A). The FSLIC may choose the course of action which "it deems to be in the best interest of the association, its savers, and the Corporation." 12 U.S.C. § 1729(b)(1)(A).

The statutory grant of flexibility and discretion to the Receiver may not be limited by state imposed restrictions. *de la Cuesta* at 155.[3] Plaintiffs argue that Congress could not have intended the federal statute to preempt state law prohibiting fraud. While this statement may be true, Congress gave the FSLIC the power to dispose of a failed institution in

[3] The Court held that "Congress invested the Board with broad authority to regulate federal savings and loans so as to effect the statute's purposes, and plainly indicated that the Board need not feel bound by existing state law." *de la Cuesta* at 162.

accordance with broad general guidelines. 12 U.S.C. § 1729(b)(1). When, as in this case, the Receiver distributes assets in accordance with the priorities established by Texas law,[4] such a transfer of assets is, by definition, not fraudulent because it is authorized by law. *See, e.g.*, art. 852a, § 8.09(g).

Plaintiffs also rely on *Coit* to defend against the conflicts/preemption theory. In *Coit*, however, the Court recognized that § 1464(d)(6)(C) prohibits "collateral attacks attempting to restrain the receiver from carrying out its basic functions." 57 U.S.L.W. at 4350. Movants argue and the Court agrees that the FSLIC's distribution of the assets of the Old Sunbelt receivership estate in accordance with the Bank Board's regulations is a basic receivership function that comes squarely within the ambit of § 1464(d)(6)(C). *See also*, *supra*, at 3.

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[4] As of June 1988, before the appointment of the Receiver, Old Sunbelt was insolvent by $1,894,984,000.00. In Resolution No. 88-788P, the Bank Board directed the FSLIC to liquidate claims against Old Sunbelt in accordance with the priorities established in 12 C.F.R. § 596c.11 of the Rules and Regulations for the Federal Savings and Loan System. In 12 C.F.R. § 569c.11(a)(6), the Receiver is directed to observe the priorities of creditors established by state law, in states such as Texas that have enacted a specific priority statute governing the liquidation of state chartered savings and loans by the state authorities. Under the Texas priority statute, claims of depositors and secured creditors have priority over the claims of general unsecured creditors, like Plaintiffs'. *See* Tex. Rev. Civ. Stat. Ann. art. 852(a), § 8.09(g) (Vernon Supp. 1988).

Because Old Sunbelt was insolvent by nearly $2 billion, it was clear that if Old Sunbelt were liquidated, insufficient assets would be available to pay claims of even the highest priority secured creditors, and that unsecured creditors in the lower priority class would receive nothing. Even though, Old Sunbelt was not "liquidated" in the traditional sense, its assets were transferred giving priority to depositors and secured creditors in New Sunbelt and leaving the liabilities of remaining unsecured creditors with the Receiver. *See* Bank Board's Brief at 9-11.

Accordingly, Movants' Motion for Summary Judgment is GRANTED. A Final Judgment will be entered herewith.

SO ORDERED.

JUDGMENT

This Judgment is entered pursuant to the Court's Memorandum Opinion and Order, dated June 7, 1989.

IT IS ORDERED, ADJUDGED and DECREED by the Court that Plaintiffs take nothing by their suit against Defendants; that Plaintiffs' claims be, and each claim is hereby, DISMISSED on the merits.

Costs of court are taxed against the Plaintiffs.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 89-1623

MICHAEL GULLEY, ET AL.
Plaintiffs-Appellants,

versus

SUNBELT SAVINGS, F.S.B., ET AL.,
Defendants-Appellees.

No. 89-1624

VALLEY RANCH DEVELOPMENT CO., LTD., ET AL.,
Plaintiffs-Appellants,

versus

SUNBELT SAVINGS, FSB, ET AL.,
Defendants-Appellees.

Appeals From The United States District Court For The Northern District Of Texas

ON PETITION FOR REHEARING
(June 27, 1990)

Before GOLDBERG, REAVLEY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
UNITED STATES CIRCUIT JUDGE

UNITED STATES CONSTITUTION
ARTICLE III, SECTION 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Tex. Bus. & Com. Code § 24.005

Transfers Fraudulent as to Present and Future Creditors

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose within a reasonable time before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) intended to incur, or believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

(b) In determining actual intent under Subsection (a)(1) of this section, consideration may be given, among other factors, to whether:

(1) the transfer of obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Tex. Bus. & Com. Code § 24.006

Transfers Fraudulent as to Present Creditors

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

Tex. Bus. & Com. Code § 24.008

Remedies of Creditors

(a) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 24.009 of this code, may obtain:

(1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(2) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the applicable Texas Rules of Civil Procedure and the Civil Practice and Remedies Code relating to ancillary proceedings; or

(3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

(A) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of the other property;

(B) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(C) any other relief the circumstances may require.

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

Tex. Rev. Civ. Stat. Ann. art. 852a, § 8.09(g)

Liquidation By Commissioner's Order

On liquidation of an association, claims for payment shall have the following priority:

(1) obligations incurred by the commissioner or the liquidating agent, fees and assessments due to the department, and expenses of liquidation, all of which may be covered by the proper reserve of funds;

(2) claims of creditors having an approved claim as set forth in this section, to the extent that such claims are secured by, or constitute a lien on, the assets or property of the association;

(3) the claims of depositors having an approved claim against the general liquidating account of the association;

(4) claims of general creditors having an approved claim as set forth in this section, and the unsecured portion of any creditor obligation described in Subdivision (3);

(5) claims otherwise proper that were not filed within the time prescribed by this section;

(6) approved claims of subordinated creditors; and

(7) claims of shareholders of the association.

(2)

No. 90-537

Supreme Court, U.S.
FILED
NOV 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL H. GULLEY, ET AL., PETITIONERS

v.

SUNBELT SAVINGS, FSB
(FEDERAL DEPOSIT INSURANCE CORPORATION,
RECEIVER)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ALFRED J.T. BYRNE
General Counsel

MARK I. ROSEN
Deputy General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
Senior Counsel

RICHARD J. OSTERMAN, JR.
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a purchase and assumption transaction entered into by the Federal Savings and Loan Insurance Corporation as receiver for an insolvent savings and loan association is voidable under the Texas Uniform Fraudulent Transfer Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-537

MICHAEL H. GULLEY, ET AL., PETITIONERS

v.

SUNBELT SAVINGS, FSB
(FEDERAL DEPOSIT INSURANCE CORPORATION,
RECEIVER)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 902 F.2d 348. The opinion of the district court (Pet. App. 7a-12a) is reported at 714 F. Supp. 819.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1990. A petition for rehearing was denied on June 27, 1990. Pet. App. 13a. The petition for a

writ of certiorari was filed on September 24, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 19, 1988, the Federal Home Loan Bank Board (Bank Board) declared Sunbelt Savings Association insolvent. The Bank Board appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver and directed it to liquidate Sunbelt.[1] Pet. App. 2a. Federal regulations establish an order of priority for paying creditor claims against insolvent thrift institutions, and require the receiver to pay higher priority claims in full before paying any lower priority claims. 12 C.F.R. 569c.11(d) (1989).[2] The applicable regulations provided that if the failed association "was operated under the laws of a state that provided a priority for holders of withdrawable accounts over * * * other claims or general creditors, such priority * * * shall be observed by the receiver." 12 C.F.R. 569c.11(a)(6) (1989). Texas law provides that claims of depositors have priority over the claims of general unsecured creditors. Tex. Rev. Civ. Stat. Ann. art. 852a § 8.09(g)(2)-(4) (Vernon Supp. 1990).

The Bank Board determined that Sunbelt's assets were not sufficient to pay its depositors and secured

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[1] The Federal Deposit Insurance Corporation (FDIC) later assumed FSLIC's role as receiver for Sunbelt pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 401(a), (f), (h), 103 Stat. 354, 356, 357. Accordingly, the FDIC is the respondent in this action.

[2] The federal priority regulations have been transferred to 12 C.F.R. 389.11 (1990).

creditors in full. The consequence of this determination was that general unsecured creditors of Sunbelt, whose claims were subordinate to the claims of depositors and secured creditors under the applicable priority regulations, were not entitled to any assets of the receivership estate. The Bank Board authorized FSLIC, as receiver for Sunbelt, to enter into a purchase and assumption transaction with Sunbelt Savings, FSB (New Sunbelt), a newly chartered federal savings bank. Pursuant to a purchase and assumption agreement, FSLIC transferred substantially all the assets of Sunbelt Savings to New Sunbelt. In return, New Sunbelt agreed to assume Sunbelt's liabilities to depositors to the extent of their deposits, as well as Sunbelt's liabilities to secured creditors to the extent of the value of their collateral. New Sunbelt did not agree to assume liability on claims by Old Sunbelt's general unsecured creditors. Thus, FSLIC arranged through the purchase and assumption transaction for the bulk liquidation of most of Sunbelt's assets, and at the same time arranged for the satisfaction of all of Sunbelt's liabilities to depositors and secured creditors. Pet. App. 2a, 11a n.4.

2. Prior to the Bank Board's declaration that Sunbelt Savings was insolvent, petitioners defaulted on substantial loans from Sunbelt. They then filed an action against Sunbelt in state court asserting lender liability claims. Following its appointment as receiver, FSLIC removed petitioners' action to the United States District Court for the Northern District of Texas, where it remains pending. Petitioners subsequently filed a second action in state court seeking a declaratory judgment that the purchase and assumption transaction between the receiver and New

Sunbelt violated the Texas Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code Ann. §§ 24.001-24.013 (Vernon 1987). The Bank Board and FSLIC intervened as defendants and removed the declaratory judgment action to federal court. Pet. App. 2a-3a, 8a.

3. The district court granted the respondents' motion for summary judgment in the declaratory judgment action. Pet. App. 7a-12a. The court held that application of the Texas Uniform Fraudulent Transfer Act was preempted by federal statutory provisions granting the Bank Board broad discretionary powers to regulate the savings and loan industry, and empowering FSLIC as receiver to choose the course of action that "it deems to be in the best interest of the association, its savers, and the Corporation." Pet. App. 10a (quoting 12 U.S.C. 1729(b)(1)(A)).

4. The court of appeals affirmed without reaching the preemption question, holding that petitioners were not entitled to relief under the Texas Uniform Fraudulent Transfer Act. Pet. App. 1a-6a. In order to obtain relief under that Act, the court noted, petitioners were required to show, at a minimum, (1) a right to payment out of the assets of the receivership estate; (2) that assets were transferred out of the estate; (3) that the transfer was fraudulent within the meaning of the statute; and (4) that avoidance of the transfer was necessary to satisfy their claims. Pet. App. 3a. Here, the court concluded, petitioners failed to make the required showing. The court observed that FSLIC is required by the federal priority regulations to pay depositors' claims in full before paying any general creditors' claims. The Bank Board determined that Sunbelt's assets were insufficient to pay depositors and secured creditors, and

consequently determined that the claims of unsecured creditors were worthless.[3] The court of appeals expressly stated that, even if this "worthlessness determination" is subject to challenge in a collateral proceeding such as this, petitioners had failed to challenge it in the district court and would not be permitted to do so on appeal. Pet. App. 5a n.4. The court of appeals concluded that the conditions for obtaining relief under the Texas Uniform Fraudulent Transfer Act had not been met. If petitioners are unsecured creditors, the Bank Board's worthlessness determination forecloses their right to payment out of the assets of the receivership estate. And if petitioners are secured creditors, avoidance of the acquisition agreement is unnecessary because petitioners can recover from New Sunbelt. Pet. App. 5a.

The court of appeals declined to consider petitioners' additional arguments "attacking the means by which FSLIC carried out its receivership responsibilities" and asserting "various constitutional violations," because petitioners had not raised them in the district court, and because they are irrelevant to the question whether the Texas Uniform Fraudulent Transfer Act requires avoidance of the transfer of assets to New Sunbelt. Pet. App. 6a.

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[3] Because Sunbelt was insolvent by nearly $2 billion, it was clear that upon liquidation there would be insufficient assets to pay claims of even the highest priority secured creditors, and that consequently unsecured creditors would receive nothing. See Pet. App. 11a n.4.

ARGUMENT

The decision of the court of appeals rests largely on its interpretation of Texas law. The decision is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners contend (Pet. 4-8) that the decision of the court of appeals deprives them of procedural due process and violates separation of powers principles. The short answer to these contentions is that they were not raised in the district court. Moreover, petitioners' constitutional claims focus on the Bank Board's worthlessness determination, a determination that petitioners failed to challenge in the district court.[4] Because petitioners failed to raise their constitutional arguments in the district court, and because they are not closely related to petitioners' claim under the Texas Uniform Fraudulent Transfer Act, the court of appeals properly declined to address them. See *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule * * * that a federal appellate court does not consider an issue not passed upon below."). Similarly, this Court generally declines to consider issues not raised in the courts below. See *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941). Accordingly, review of petitioners' constitutional contentions is not warranted.[5]

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[4] Although the question is not presented in this case, respondent's position is that petitioners could have sought judicial review of the Bank Board's worthlessness determination pursuant to the Administrative Procedure Act, see 5 U.S.C. 702-706, but not in a collateral proceeding such as this. See *Village South Joint Venture* v. *FDIC*, 733 F. Supp. 50 (N.D. Tex. 1990).

[5] There is no plausible argument that petitioners were subjected to a clear miscarriage of justice in this case. They do

2. Petitioners incorrectly contend (Pet. 8-9) that the decision of the court of appeals conflicts with this Court's decision in *Coit Independence Joint Venture* v. *FSLIC*, 109 S. Ct. 1361 (1989). In *Coit*, this Court held that the statutes governing FSLIC and the Bank Board do not confer on FSLIC authority to adjudicate the merits of creditors' claims against a failed savings and loan institution, and do not divest courts of jurisdiction to consider those claims *de novo*. *Id.* at 1368. In this case, neither the Bank Board nor FSLIC has attempted to adjudicate the merits of petitioners' claims (which remain pending in a separate action) or to divest the court of jurisdiction over those claims. Instead, the Bank Board determined that Sunbelt's assets were insufficient to satisfy any general creditors' claims. Petitioners assert that "[t]he Fifth Circuit effectively held that the FHLBB has adjudicatory power, because it held that the FHLBB's finding that general creditors' claims against Sunbelt are worthless is determinative of [petitioners'] claims." Pet. 10. But the worthlessness determination did not address the merits of petitioners' claims; that determination simply recognized that—whether or not the claims were meritorious—there were no assets in the receivership estate to pay them. Moreover, the court of appeals did not suggest that petitioners had no opportunity to obtain judicial review of the Bank Board's worthlessness determination. The court said only that it was bound by that determination because petitioners had failed to challenge it in the district court. Pet. App.

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not deny that Sunbelt Savings was "insolvent by nearly $2 billion," that its assets were not sufficient to pay its depositors, and that depositors' claims took priority over petitioners' claims. See Pet. App. 11a n.4.

5a. See note 4, *supra*. In short, there is no conflict with *Coit*.

3. Petitioners also assert (Pet. 10-11) that the Fifth Circuit's decision in this case conflicts with its decision in *Triland Holdings & Co.* v. *Sunbelt Service Corp.*, 884 F.2d 205 (1989). Intra-circuit conflicts generally do not warrant a grant of certiorari. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). And in any event, the court of appeals' decision in this case does not conflict with its decision in *Triland*. In *Triland*, the Fifth Circuit declined to dismiss the plaintiffs' claims as moot because of "the possibility that at some point [plaintiffs], if successful in their damages claims, will be able to collect." 884 F.2d at 208. The court considered FSLIC's contention "that there will *never* be any assets with which to satisfy a judgment," and said that "[i]f true, this contention would justify dismissal of these actions on prudential grounds." *Ibid.* Based on the record in *Triland*, however, the court was "unable to conclude that all potential forms of relief are permanently precluded." *Ibid.* In this case, in contrast, the court did not dismiss petitioners' claims on the merits, but held only that petitioners were not entitled to set aside the purchase and assumption transaction under the Texas Uniform Fraudulent Transfer Act. The record in this case fully justifies the court's holding, and its conclusion that the Bank Board's worthlessness determination forecloses petitioners' right to payment from the receivership estate.

4. Petitioners next assert (Pet. 11-12) that the courts below misapplied the priority regulations. Petitioners contend that the Texas priority statute applies only to liquidations, and assert that the purchase and assumption transaction was not a liquida-

tion. The resolution of this state law question hardly warrants further review by this Court. Moreover, the court of appeals correctly concluded that the purchase and assumption transaction was a form of bulk liquidation that expedited the distribution of assets to those entitled to receive them. Pet. App. 4a n.2. In the purchase and assumption transaction, FSLIC distributed substantially all the receivership assets to New Sunbelt, and in return obtained New Sunbelt's agreement to assume liability for the claims of depositors and secured creditors. Because the receivership assets were insufficient to satisfy the claims of depositors and secured creditors, the receiver did not pay any claims of unsecured creditors. The purchase and assumption arrangement was an efficient way to allocate assets among competing claimants with different priorities. As such, it was properly classified as a form of liquidation.

5. Finally, petitioners are incorrect in asserting (Pet. 12-13) that the decision of the court of appeals "nullifies" the Texas Uniform Fraudulent Transfer Act. Pet. 13. The court of appeals' held only that the requirements for obtaining relief under the Texas statute were not met in this case, not that the statute is a nullity. Contrary to petitioners contention (Pet. 12), the court of appeals did not say that petitioners are not "creditor[s]" within the meaning of the Texas statute. Rather, the court held that petitioners had no right to payment out of the assets of the receivership estate (if they are unsecured creditors), or that avoidance of the transfer was unnecessary to satisfy their claims (if they are secured creditors). Pet. App. 3a. In either case, the conditions for avoiding a transaction under the Texas Uniform Fraudulent Transfer Act were not satisfied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ALFRED J.T. BYRNE
General Counsel

MARK I. ROSEN
Deputy General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
Senior Counsel

RICHARD J. OSTERMAN, JR.
Counsel
Federal Deposit Insurance Corporation

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